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In The Supreme Court of the United States

OCTOBER TERM, 1982

JOHN DILEO
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

APPENDIX

APPENDIX (1)

OPINION OF THE UNITED STATES DISTRICT COURT (HON. ELLEN B. BURNS) dated September 17, 1982

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

IN RE:

MISC. N.H. 424

GRAND JURY SUBPOENA (DILEO BROTHERS, INC.)

RULING ON GOVERNMENT'S MOTION FOR IN CAMERA EVIDENTIARY HEARING

The Grand Jury issued a subpoena duces tecum to DiLeo Brothers, Inc. seeking certain business records.

DeLeo Brothers, Inc., through its president John DiLeo, Jr., resisted the subpoena on the grounds that some of these records are held by a family partnership. A new subpoena was then served on John DiLeo, Jr., as partner, who claims that these records are privileged under the fifth amendment.

The Government and Mr. DiLeo agree

that the court should hold an in camera evidentiary hearing to determine whether Mr. DiLeo may invoke a fifth amendment privilege with respect to the partnership records. They disagree, however, over the format of the proceeding. The Government urges the court to permit an Assistant United States Attorney, unconnected with the investigation, to be present. Mr. DiLeo's testimony at the hearing would be privileged; the transcript of the hearing would be privileged; the transcript of the hearing would be sealed; and the Assistant United States Attorney would be subject to a protective order.

Mr. DiLeo argues that his fifth amendment privilege can only be guaranteed by an ex parte hearing, as suggested in In re Katz, 623 F.2d 122, 127 (2d Cir. 1980). In Katz, the court ordered an in camera hearing at which the party's

referred to Matter of Grand Jury Empanelled February 14, 1978, 603 F.2d 469, 474-75 (3d Cir. 1979), where the hearing was exparte.

In an ex parte evidentiary hearing, the court would be obliged to take an active role, soliciting testimony about Mr. DiLeo's relation to the family partnership and the basis for his fifth amendment claim. The presence of an Assistant United States Attorney would, in addition to providing representation for the grand jury, relieve the court of this burden.

Mr. DiLeo's testimonial privilege
can be protected by court order. If
that court order should ever be violated,
appropriate sanctions may be taken,
including disciplinary sanctions against
the offending official or dismissal of
charges based upon evidence obtained in

violation of the privilege.

Then District Judge Newman in In re Cardassi, 351 F. Supp. 1080, 1082 (D. Conn. 1972), dealt with a similar need to protect the fifth amendment privilege of a grand jury witness who had been immunized but feared foreign prosecution. The court noted that "If a federal or state prosecuting official attempts to use evidence obtained directly or derivatively from a witness compelled to answer after receiving use immunity, the courts of this country have power to make sure that such evidence is excluded, or that any conviction thereby obtained is set aside." The Cardassi court, however, rejected the government's argument that grand jury secrecy and judicial control could adequately protect the immunized witness from foreign prosecution. Contra In re Baird, 668 F.2d 432, 434 (8th Cir.), cert. denied, ______, 102 S. Ct. 2255 (1982), and other cases cited therein.

The facts of this case are clearly distinguishable from those of <u>Cardassi</u>.

First, Mr. DiLeo does not allege any fear of foreign prosecution. Second, there is less danger that the testimonial privilege of an <u>in camera</u> hearing will be violated than that of a grand jury proceeding. Third, the presence of an Assistant United States Attorney protects the court's neutrality.

We hold, therefore, that there is no real danger that the presence of an Assistant United States Attorney, unconnected with the investigation and subject to a protective order, would endanger Mr. DiLeo's fifth amendment privilege. The Government's motion is granted.

An in camera evidentiary hearing

shall be scheduled for 4:00 p.m., October 13, 1982.

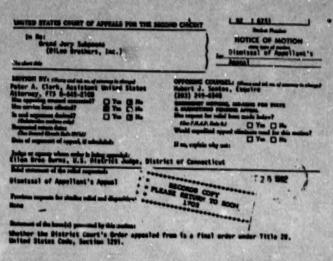
SO ORDERED.

/s/ Ellen Bree Burns
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 17th day of September, 1982.

APPENDIX (2)

MOTION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (HON. WILFRED FEINBERG, HON. RICHARD J. CARDAMONE AND HON. OSCAR H. DAVIS) dated January 11, 1983



Shid statement of the host restaurance structure for a position moved in the District Court to quests a great Jury subsection of the produce carries presents produced the United States' motion for an in comera hearing on District act which Oilso's Positionary would be privileged and at which on Assistant United States 'Alternay, under a presentive order, small be allowed to represent the great jury. Disco 'a appeals the District Court's ruling, souting, essentially, to prevent the presence of the Assistant United States Attorney at the hearing. (p.1, Jumpandem in Supert of Notion to Dismiss and Ex. 8).

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